

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch**

Mulberry Street Deli and Grocery LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0232207

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), was properly imposed against Mulberry Street Deli and Grocery LLC (Appellant), by the Retailer Operations Division (Retailer Operations). However, the determination is modified to remove the fiscal claim of \$173.88.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6(e)(1)(i) and 7 CFR § 278.6(i) in its administration of the SNAP when it imposed a permanent disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

By Charge letter dated October 9, 2020, Retailer Operations informed Appellant it was charged with violating the terms and conditions of the SNAP regulations determined by a USDA investigation. Appellant was charged with trafficking based on violations noted in Exhibits C and D. The violations in Exhibits A, E, and F were noted to warrant a non-permanent disqualification period as specified in Section 278.6(e) of the SNAP regulations. The investigation was conducted during the period of July 20, 2020, through July 27, 2020, and outlined in the provided investigative report dated July 31, 2020. Counsel requested extensions

to reply to the Charge letter by emails dated October 22 and October 30, 2020. Retailer Operations granted the requested extensions. Counsel replied to the Charge letter on November 20, 2020, and provided some documentation.

Retailer Operations informed Appellant by Determination letter dated February 18, 2021, that it was permanently disqualified from participation as a retail food store in the SNAP in accordance with Section 278.6(c) and 278.6(e)(1) of the SNAP regulations, and a fiscal claim for \$173.88 was established. The letter states that the store was not eligible for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i), because the firm failed to submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter dated February 26, 2021, counsel appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated March 8, 2021. Counsel provided a letter to this office by email dated March 29, 2021.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing credible, relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR).

7 CFR § 278.6(e)(1)(i) states: FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2. 7 CFR § 271.2 Trafficking means: “(1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.”... (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food. (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food. (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.”

7 CFR § 278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).”

7 CFR § 278.6(i) states: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

SUMMARY OF THE CHARGES

The USDA conducted a compliance investigation of Appellant. Appellant was charged with conducting trafficking transactions as described in Exhibits C and D. The penalty for trafficking is permanent disqualification. Further, the violations in Exhibits A, E, and F warrant a non-permanent disqualification period specified in Section 278.6(e) of the SNAP regulations.

APPELLANT’S CONTENTIONS

In reaching a decision, full attention and consideration have been given to all contentions and submissions as presented, including any not specifically recapitulated.

- I have been able to obtain the records relating to the participants relating in 5 U.S.C. § 552 (b)(6) & (b)(7)(C). I enclosed herewith: Certificate of Formation filed May 23, 2006 showing that the members of the LLC were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). A Certificate of Amendment was filed with the State Treasurer’s office on June 2, 2011 adding to the membership and managers of the business 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and thereafter a second certificate of amendment was filed. The second Certificate of Amendment was filed on March 2, 2012, which effectively removed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and leaving only 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as the managing member of the company. I am advised that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) did not re-enter the business thereafter so at the time of the charges which cover the period July 2020 through July 27, 2020 neither 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were members of the LLC.
- I do not now seek a review of the finding of the monetary loss to the Program, and payment will be made within thirty (30) days of the receipt of the letter dated February 18, 2021.
- I have become the sole managing member of the Mulberry Street Deli and Grocery, LLC effective September 9, 2020. At the time that I assumed sole management of the LLC, I was not advised of the alleged violations described in the letter of October 9, 2020. I had been a member of the LLC until 2012. I left the company in 2012 to 5 U.S.C. § 552 (b)(6) & (b)(7)(C), a distant relative. In 2020 she wanted to leave the business and I assumed management of the company. No payment was made to her upon her leaving the company.
- The company has been in existence since 2006, at the same location and has never prior to the October 20, 2020 notification been found to be in violation of any of the SNAP

regulations. Upon undertaking management of the business, I reviewed with the staff the SNAP Program regulations and since my undertaking of the business, I know of no infractions of the regulations.

- Upon my investigation into the violations described in exhibits A through F, I realized that while the clerks were well aware of the need to be sure that the EBT card was accepted only for eligible food items, they were not as aware that those purchased from third persons from an outside source could not be purchased by them in an individual or employee capacity. I was advised by the clerk who handled the transactions described in exhibits B and C that he had purchased the Ensure Nutritional Shake for personal use and the use of his family.
- I have made sure that any of the people who are working for our company know that the term trafficking has a much broader meaning than they would know from their prior experience. We have made it a strict rule that they are not to take any merchandise from any non-regular wholesaler that we deal with, and that if they have any knowledge that items are being brought in which they did not buy from our store or which they claim that they bought at retail from another store that they are not to accept it for any purpose, including purchases that were made outside of the store through the use of SNAP benefits.
- The disqualification of our business from membership in the SNAP program will create a hardship, not only for our business, but for the people in our neighborhood.
- We request that you take into account all of the years of operation of this company, this is the first time that we have had violations and additionally, we request that you take into account the small amount involved monetarily in those violations. It is clear from the investigative report that among the transactions questioned there was an actual refusal by a clerk to permit the sale of non-eligible items as in exhibit B.
- I have discussed the pending matter with one of the present members of the Mulberry Street Deli and Grocery, LLC, and he has assured me that he has taken steps that anyone who is in the position to accept SNAP sales has reviewed the requirements of the Program. In addition, he has made arrangements to present the training videos that are on the website to further the training of the relevant employees.
- In all of the years that the store has been in operation there has not has been a prior violation of the regulations and every step is being taken to be sure that it will not occur again.
- Based on the prior good record and the steps being taken by the owners to make sure that there will be no misconduct in the future, we respectfully request that the Department provide a moderate penalty that will permit the business to continue accepting the SNAP Program m1d to serve the people in the neighborhood.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the determination of Retailer Operations. This review is limited to the facts at the basis of that determination at the time it was made. The regulations establish that an authorized retail food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The Charge letter Exhibits recount the details of two violative trafficking exchanges by store personnel, who intentionally purchased products originally purchased with SNAP benefits in exchange for cash.

Retailer Operations determined that Appellant completed the online SNAP reauthorization application on April 6, 2016. The submitter disclosed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were officers in the private corporation which owned the store, and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was no longer an officer in the corporation. The form was signed electronically by 5 U.S.C. § 552 (b)(6) & (b)(7)(C). FNS records support that as result of the reported change on the SNAP reauthorization application form, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was disassociated with the firm on April 6, 2016. FNS records show that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) signed the consent form for the FNS store visit survey completed on May 15, 2016, and disclosed his title to be “owner.” The firm was reauthorized by FNS on May 26, 2016, under the ownership 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The documents provided by counsel do not support any change, transfer, or sale of ownership or ownership shares in the corporation prior to the violations occurring at Appellant under the ownership 5 U.S.C. § 552 (b)(6) & (b)(7)(C). No documents were submitted indicating the change, transfer, or sale of the business occurred prior to the occurrence of the violations. As no other reported changes in ownership were disclosed to FNS following the firm’s reauthorization, or prior to the occurrence of the charged violations, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are the store owners of record with FNS who were in place at the time of the charged violations. As such, they are liable for the violations that occurred at Appellant.

Ownership is accountable for the proper handling of SNAP benefit transactions. To allow the store owners to be free from accountability for the acts of persons whom the owners allowed to conduct store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

To allow store ownership to be excused from an imposed administrative sanction, based on purported after the fact training, would render virtually meaningless the enforcement provisions of the Act, as amended, and the enforcement efforts of the USDA. Moreover, giving special consideration to Appellant would forsake fairness and equity, not only to competing stores, and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified as retail food stores from the SNAP for similar violations.

The record is specific with regard to the dates of the violative exchanges by the store personnel of cash for products purchased with SNAP benefits. The preponderance of the evidence in the record supports that trafficking, as described in the regulations, did occur at Appellant. The regulations stipulate the FNS shall disqualify a firm permanently if firm personnel have trafficked.

CIVIL MONEY PENALTY

The regulations at Section 278.6(i) specify the criteria for a firm’s eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. A firm must submit a timely request for a CMP that shows substantial evidence which demonstrates that the firm had established and

implemented an effective compliance policy and program to prevent SNAP violations. The standard of substantial evidence is difficult to meet, nevertheless, such is the standard required by the regulations, and to which Appellant is held during the course of this review. The record supports that Appellant did not submit timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. A trafficking CMP was properly denied.

CONCLUSION

The record supports the intentional violative exchanges by store personnel of cash for items purchased with SNAP benefits that meet the regulatory definition of trafficking in two Exhibits conducted during a USDA investigation. The denial of a trafficking CMP is also in accordance with the applicable regulations. The permanent disqualification of Appellant as a SNAP retail food store is therefore sustained. The determination is modified to dismiss the fiscal claim. Appellant may pursue the refund of a paid claim. The effective date of this decision is 30 days after delivery of the decision to Appellant.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to 7 CFR § 279.7 of the regulations, with respect to applicable rights to judicial review of this decision. If a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district where Appellant's owners reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of delivery of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

April 9, 2021